Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

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ROBERT ABRAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit, like a majority of other Federal Courts of Appeals should require district courts to instruct juries not to discuss the case among themselves until the close of all of the evidence and the court's instruction on the law?

2. When mid-trial discovery of pre-deliberation discussion is raised, should appellate courts presume prejudice if they are unable to perform informed appellate review on the issue of prejudice because the district court failed to conduct a suitable investigation?

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In The

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October Term, 1997

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ROBERT ABRAMS,

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v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Second Circuit (Van Graafeiland,

Jacobs, Lay) [1] decided February 23, 1998, *United States of America v. Robert Abrams*, No. 97-1315, affirming Petitioner's conviction and sentence, is appended hereto as **Appendix A.**

JURISDICTION

Petitioner seeks a Writ of Certiorari to review the Judgment of the Court of Appeals for the Second Circuit entered on February 23, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V, attached hereto as **Appendix** B.

United States Constitution Amendment VI, attached hereto as **Appendix C.**

STATEMENT OF THE CASE

Petitioner, Robert Abrams, seeks a Writ of Certiorari under Supreme Court Rule 10(a) on the grounds that the Second Circuit Court of Appeals has: (1) "entered a decision in conflict with the decision of another United States court of appeals on the same important matter" and (2) "so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for

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[1] Honorable Donald P. Lay, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

an exercise of this Court's power of supervision."

Petitioner appealed to the Second Circuit from a judgment entered in the United States District Court for the Southern District of New York (Sprizzo, J.), following a jury trial. The jury convicted Petitioner of three counts of subscribing to false personal tax returns in violation of 26 U.S.C. §7206(1), counts two, three and four of a thirteen-count indictment. Judge Sprizzo declared a mistrial as to the remaining ten counts. Count one charged Petitioner with conspiracy to defraud the Internal Revenue Service ("IRS") and to evade taxes in violation of 26 U.S.C. §7201. The remaining nine counts charged Petitioner with aiding and abetting the tax evasion of three individuals during the years 1988 through 1990, in violation of 26 U.S.C. §7201 and 18 U.S.C. §2.

Each of the three counts of conviction carried a maximum statutory penalty of three years. Based upon a total offense level of 28 and a Criminal History Category of 1, Petitioner's guideline ranged was 78 to 97 months. On May 16, 1997, Judge Sprizzo sentenced Petitioner to 78 months imprisonment and required that he pay a $125,000 fine.

A. THE TRIAL COURT'S PRELIMINARY INSTRUCTION AND JURY NOTE

The trial court made brief, preliminary remarks to the jury when it was sworn on September 3, 1996. In concluding its remarks, the court instructed the jury not to read anything in the newspapers that related to the case, including anything concerning the IRS or taxes in

general. The court explained to the jurors that it was giving this instruction because they had to decide the case based only on the evidence, and not based on anything they read or saw outside the courtroom. However, the court's remarks did not include an instruction not to talk about the case either with outsiders or among themselves.

After the jury left the courtroom, trial counsel asked the court whether it "gave them all the instructions not to discuss the case?" The court responded that it "did that already," and that it would "give them a full instruction before we start the trial."

Just prior to opening statements, the court elaborated on its preliminary instructions. However, it again failed to instruct the jury not to discuss the case with outsiders or among themselves until the conclusion of all the evidence and the court's instruction on the law.

Following the parties opening statements, court recessed for twenty minutes following which the government presented the testimony of IRS Agent Patrick Campbell who testified generally about the methods used by the IRS for determining an individual's tax liability. The trial then adjourned for lunch. The lunch break lasted one hour and fifteen minutes.

When the court reconvened after lunch, the clerk handed the judge a note from one of the jurors that read:

> Your Honor,
>
> Since there are several jury members that are new to the judicial system, please

remind them about discussion prior to going to deliberation.

Juror

The following exchange between defense counsel and the court then ensued:

COUNSEL: Have you seen that last note, Judge?

COURT: Yes, I have. I normally give them that instruction.

COUNSEL: Judge, the only thing is that it appears from the note that the jury may have begun discussing the case even though they haven't been instructed yet. I wonder if the Court would be willing to have the juror who wrote the note just come into the robing room, perhaps with counsel, and find out what prompted the juror to write this note.

COURT: I think that would be most improvident.

COUNSEL: Whatever your Honor would suggest. I am not sure whether there have been any discussions.

COURT: That would be unduly intrusive upon the jury's process, so to speak. For me to go in the jury room and say, "What have you people been talking about?" is really intrusive.

COUNSEL: Just the one juror who wrote the note.

COURT: It is the same problem. I normally would give them an instruction as part of my opening remarks that they not discuss the case during the trial, which is all I intend to do.

COUNSEL: Perhaps we can do this. In response to the note, Your Honor can give that instruction, and then, with the Court's permission, perhaps I can just think a little bit more about it so we don't have to take up any more time today. If on Monday I have a specific application, I will make it then.

COURT: The jury may be of the mind to think they can discuss this case during the trial. I thought I told them they can't.

COUNSEL: I think you did. I think you told them that when you excused them Tuesday night. I think you said they are not permitted to discuss the case.

COURT: I meant discuss it with outsiders. Normally I tell the jury, as part of my general instructions, that they are not to discuss it even among themselves.

There is nothing improper in the jury's discussing the case among themselves

> before they reach deliberations. There is nothing ipso facto wrong with it. It is just not a good idea, and I tell the jury not do it. But I don't know that any other judges tell the jury not to do it. You just happen to have a very smart juror who maybe has served on other juries before and has heard that instruction from other judges and thinks I should give it here. That is about as far as I am going to go. I don't know that there is anything wrong with the jury's discussing the case.
>
> I think at the moment what I am inclined to do is to give them my standard instruction, remind them that when I said don't discuss the case with anybody, I meant don't discuss it even among themselves. I give a fairly elaborate charge on that.
>
> You have your exception. I think doing anything more would be overly intrusive into the jury process.

Prior to the resumption of the government's case, the trial court gave a cautionary instruction that it admittedly failed to give at the outset of trial. The court instructed the jury, *inter alia,* not to discuss the merits of the case with each other until they heard all of the evidence, the final instructions on the law, and received permission from the court to begin deliberations.

REASONS FOR GRANTING THE WRIT

POINT I

THE INSTANT WRIT SHOULD BE GRANTED TO RESOLVE THE SPLIT BETWEEN THE SECOND CIRCUIT AND OTHER FEDERAL COURTS OF APPEALS CONCERNING WHETHER JURIES MUST BE INSTRUCTED NOT TO DISCUSS THE CASE AMONG THEMSELVES UNTIL THEY BEGIN FORMAL DELIBERATIONS

The United States Constitution guarantees all criminal defendants the right to a "fair trial" by an "impartial jury." U.S. Const. Amends. V & VI. It is the district court's role to safeguard these rights during all stages of trial, beginning with jury selection and ending with the jury's verdict. *See Smith v. Phillips,* 455 U.S. 209, 217 (1982). Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent judicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

The Second Circuit recognizes that "most" courts instruct jurors not to discuss the case among themselves until the all of the evidence has been presented and they have been instructed on the law. *United States v. Viale,* 312 F.2d 595, 602 (2d Cir. 1963). However, contrary to most other Federal Courts of Appeals, "it has never been the law of the [Second Circuit] that the trial judge must admonish the jurors not to discuss the case among themselves." *Id.; but see United States v. Resko,* 3 F.3d

684 (3d Cir. 1993) ("Admonishing the jury [regarding premature deliberations] is critical and important duty and cannot be over-emphasized"); *United States v. Lemus,* 542 F.2d 222, 224 (4th Cir. 1976) (same); *United States v. Wiesner,* 789 F.2d 1264, 1269 n.3 (7th Cir. 1986) (same); *United States v. Yonn,* 702 F.2d 1341, 1345 n.1 (citing, *United States v. Edwards,* 696 F.2d 1277 (11th Cir.1983).

The Eleventh Circuit holds that given that premature discussions amongst jurors "certainly endangers the jury's impartiality." *Yonn,* 702 F.2d at 1345 n.1 (citing, *Edwards,* 696 F.2d at 1277). Consequently, the Third Circuit has noted that it is a "firmly established" practice in federal court to instruct jurors at the outset of trial that they may not discuss the case among themselves before hearing all of the evidence and instructions as to the law. *Resko,*_3 F.3d at 688-89 (citing, *Wiesner,* 789 F.2d at 1269 n.3); *Lemus,* 542 F.2d at 224; Lillian B. Hardwick & B. Lee Ware, *Juror Misconduct* §7.04, at 7-27 (1988); 2 Charles A. Wright, *Federal Practice & Procedure* §486, at 718 (2d ed 1982); 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice Instructions* §5.07, at 127 (1977). Moreover, the Fourth Circuit has held that, "to assure that the jury's verdict is rendered solely on the facts presented in the court and from deliberation of only the jurors sworn to hear the case, the jury must be instructed in substance:

> I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you are simply not to talk about the case." *United States v. Nelson,* 102 F.3d 1344, 1348 (4th

Cir.1996).

In support of this view, pattern jury instructions, including the Sand & Siffert volume, 1 L. Sand, et al., par. 1.02, pg 1-9, *Modern Federal Jury Instructions,* used by many federal trial judges within the Second Circuit, contains a preliminary instruction that states in pertinent part:

> "[t]o assure that you keep an open mind, you are not - and the court now instruct you - to discuss the case among yourselves during the progress of the trial. . ."
>
> "The only time you are permitted to discuss. . .the case is when it is submitted for your final consideration, and that is after all the witnesses have been heard and...after...the courts instructions as to the law."
>
> "It is only when the case is submitted to you for determination and you go into the jury room that you have the right to discuss...the evidence..." *See also* 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice Instructions*_§10.01 at 259 (1992).[2]

A number of rationales underlie the rule against premature discussions, each touching upon a defendant's

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[2] The Devitt & Blackmar volume also contains pattern jury instructions from the District Judges Association of the *Fifth* and *Eleventh* Circuits, and the Manual of Model Criminal Jury Instructions for the District Courts of the *Eighth* and *Ninth* Circuits, each which mirror the language quoted from the Sand & Siffert volume.

Sixth Amendment right to a fair and impartial jury. *Resko,* 3 F.3d at 689; *Yonn,* 702 F.2d at 1345 n.1 (citing, *Winebrenner v. United States,* 147 F.2d 322, 328 (8th Cir. 1945); *United States v. Chiantese,* 582 F.2d 974 (5th Cir.1978).

> "First, because the government presents its case first, early discussion of the case is more likely to occur before the defendant has a chance to present all of [the] evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason." *Resko,* 3 F.3d at 689.
>
> "Second, once a juror expresses [his or her] view[ ] in the presence of other jurors, [they are] likely to continue to adhere to that opinion and pay greater attention to evidence presented that comports with the opinion. Consequently, the mere act of openly expressing [their] view[ ] may tend to cause the juror to approach the cases with less than a fully open mind and to adhere to the publicly expressed viewpoint." *Id.* at 689 (citing, *Winebrenner,* 147 F.2d at 328).
>
> "Third, the jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal." *Id.*
>
> "Fourth, because the court provides the jury with legal instruction only after all the evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the

> court's instructions on the reasonable doubt standard." *Id.*
>
> "Fifth, if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence and jurors form premature conclusions about the case, the burden of proof will have been, in effect, shifted from the government to the defendant, who has the burden of changing by evidence the opinion thus formed." *Id.*
>
> "Finally, requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt." *Id.* at 689 (citing, *In Re Winship,* 398 U.S. 358, 364 (1970)).

Thus, the Second Circuit's case law, holding that trial courts need not instruct juries against premature discussion, is contrary to the long-standing belief that verdicts resulting from premature jury deliberations run the risk of impairing a defendant's Sixth Amendment right to a fair and impartial jury. *See e.g. Davidson v. United States,* 951 F.Supp. 555, 559 (W.D.Pa. 1996). As this case law is in conflict with a majority of other Federal Courts of Appeals, the Court should grant the instant Petition and resolve the split among the Circuits.

POINT II

THE INSTANT WRIT SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE FEDERAL COURTS OF APPEALS AS TO WHETHER PREJUDICE SHOULD BE PRESUMED WHEN MID-TRIAL PREMATURE DELIBERATIONS ARE BROUGHT TO LIGHT, AND THE DEFENDANT IS UNABLE TO ESTABLISH PREJUDICE BECAUSE THE TRIAL COURT FAILED TO SUFFICIENTLY INVESTIGATE THE MATTER

The Courts of Appeals agree that trial courts have the discretion to decide how to deal with allegations of premature jury deliberations. *See United States v. Bertoli,* 40 F.3d 1384, 1394 (3rd Cir. 1994) (citations omitted); *United States v. Boylan,* 898 F.2d 230, 258 (1st Cir. 1990). Prudent exercise of such discretion requires that trial courts have sufficient information to make informed decisions concerning juror issues. *United States v. Reese,* 3 F.3d 166, 173 (2d Cir. 1994). Consequently, the court's primary responsibility is to create a reliable procedure for discerning if misconduct actually occurred and if so, whether it was prejudicial. *Boylan,* 898 F.2d at 258 (citations omitted). However, despite this deference, "the reviewing court must satisfy itself that 'the district court meaningfully. . .assess[ed] the nature and extent of the jurors' premature discussions in order to ascertain whether there has been any prejudice to the defendant.'" *Bertoli,* 40 F.3d at 1394 (quoting, *Resko,* 3 F.3d at 690); *Boylan,* 898 F.2d at 258 (district courts must erect and employ a suitable framework for investigating allegations of jury misconduct, gauge its effect, and thereafter spell out their

findings with adequate specificity to permit informed appellate review).

"[P]rejudice is generally the touchstone of entitlement to a new trial when improper intra-jury influences are at issue." *Resko,* 3 F.3d at 694. In most cases where the Courts of Appeals have found that a defendant was unable to establish prejudice, the defendant's inability resulted either from his or her attorney's failure to raise the issue of premature deliberations, *see e.g. Government of Virgin Islands v. Weatherwax,* 20 F.3d 572, 578-79 (3d Cir. 1994) (attorney failed to request court to investigate the prejudicial effect of jury exposure to extra-record newspaper accounts); *United States v. Nelson,* 102 F.2d 3d 1344, 1348 (4th Cir. 1996) (defense counsel failed to object therefore defendant held to the stringent plain error standard), or because the trial court's investigation revealed that the defendant suffered no prejudice. *See e.g. Boylan,* 898 F.2d at 258-59. A different but related situation, mirroring that of the instant Petition, occurs where defense counsel raises the issue of premature jury deliberations during trial, but the defendant is unable to establish prejudice at the appellate stage because the trial court failed to conduct a sufficient inquiry. Thus, due to the trial court's failure to act, the record remains undeveloped for appellate review. In these circumstances the defendant's inability to establish prejudice lies with the trial court. *Resko,* 3 F.3d at 695.

The instant Petition raises the issue of whether, when mid-trial discovery of pre-deliberation discussion is raised, appellate courts should presume prejudice if they are unable to perform informed appellate review on the

issue of prejudice because the district court failed to conduct a suitable investigation. In other words, what action should appellate courts take where a district court fails to make the proper inquiries and this failure renders a defendant/appellant unable to establish prejudice.

Faced with this situation, the Second Circuit has refused to presume prejudice. The Third Circuit, however, has held that in such circumstances, i.e., where "the district court has failed adequately to ensure that the defendant has not been prejudiced by the improper conduct," the case should be remanded for new trial. *Bertoli,* 40 F.3d 1384 (citing, *Government of Virgin Islands v. Weatherwax,* 20 F.3d 572, 578-79 (3d Cir. 1994) (attorney's failure to request court to investigate the prejudicial effect of jury exposure to extra-record newspaper accounts of trial could constitute ineffective assistance of counsel for *habeas corpus* purposes); *Waldorf v. Shuta,* 3 F.3d 705, 713 (3d Cir. 1993) (remanding case for new trial on damages where district court failed to conduct a "searching inquiry into the extent and nature of the prejudicial extra-judicial information that reached the jurors so as to ascertain for itself whether there was a substantial likelihood of prejudice such that a new trial was warranted"); *Resko,* 3 F.3d at 695 (remanding case for new trial where district court failed to conduct meaningful inquiry into allegations of prejudicial intra-jury communications); *Davidson v. United States,* 951 F.Supp. 555, 559 (W.D.Pa. 1996) (attorney's failure to request court to investigate allegation of premature discussions among jurors constituted ineffective assistance of counsel for *habeas corpus* purposes).

This Court has been willing to presume prejudice, albeit in the context of prejudice resulting from private contact with jurors. *See Remmer v. United States,* 347 U.S. 227 (1954). In *Remmer,* a juror reported an attempt to bribe him to the judge, who then requested an FBI investigation. An FBI report concluded that the contact was made in jest, and the Court consulted with the prosecutors, who agreed the contact was harmless. The Court seemed particularly concerned that the defense did not know what occurred. Consequently, it emphasized notice to the defendant and a hearing, stating, "[t]he trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-230.

In *Smith v. Phillips,* 455 U.S. 209 (1982), the Court addressed a claim of juror partiality based on the juror's having applied for a job with the prosecutor's office. Citing *Remmer,* the Court again stressed that defendants should receive a means to demonstrate bias, stating that, "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Id. at 215. The Court did not distinguish between juror partiality and private contacts. Instead, it cited *Remmer,* and the attempted juror bribe apparently to illustrate the above principle, i.e., that a defendant should be assured an opportunity to prove prejudice.

Although *Remmer* and *Smith* dealt with jury issues in different contexts, i.e., external juror influence and

juror partiality, both demonstrate this Court's belief that trial courts should give defendants an opportunity to develop a record on the issue of prejudice. However, the question still remains as to what action appellate courts should take when a trial court has not conducted a sufficient investigation, resulting in a record where the issue of prejudice is undeveloped. Moreover, where the jury issue is brought to the trial court's attention before the start of jury deliberations, the trial court's investigative powers are not limited by Fed.R.Crim.P. 606(b). *Davidson,* 951 F.Supp. at 559 (Rule 606(b), which sharply curtails intrusions into the jury's deliberative process, does not preclude the court, "p*rior to the point of verdict* from questioning jurors [about allegations] of their individual or collective misconduct) (emphasis in original).

This Court has stressed that "a trial judge [must be] ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith,* 455 U.S. at 217. Consequently, the Third Circuit has found that when premature deliberations have taken place, it is generally incumbent upon the trial court to inquire into the "nature of the jurors' discussions." *Resko,* 3 F.3d at 691. In finding that no inquiry is necessary at this stage because it is "likely to be intrusive," the Second Circuit demonstrates a deep misperception of the trial court's role in the delicate balance between a jury's independent deliberation and its obligation to protect the trial process from conduct that impairs a defendant's right to a fair trial.

CONCLUSION

Based upon the foregoing, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

DATED: New York, New York
May 19, 1998

Respectfully submitted,

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APPENDIX

SW

St. Louis West, Inc. (7040)
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Appendix A - Decision of the United States Court of Appeals for the Second Circuit, Decided February 23, 1998 [Pages 1a - 12a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 962—August Term, 1997

(Argued: February 12, 1998 Decided: February 23, 1998)

Docket No. 97-1315

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT ABRAMS, also known as Reuben Abrams, also known as John Fallon, also known as David Jacobs,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, JACOBS, and LAY,*

Circuit Judges.

Appeal from a judgment, following a jury trial, of the United States District Court for the Southern District of New York

---

* Honorable Donald P. Lay, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A
[Decision of the USCA for the Second Circuit]

(Sprizzo, *J.*), convicting defendant of three counts of subscribing to false personal tax returns in violation of 26 U.S.C. § 7206(1). On the first day of an eight-week trial, one juror sent a note asking the court to give an instruction on premature discussion of the case, and such an instruction was given. On appeal, defendant claims that the district court abused its discretion in failing to investigate the circumstances.

Affirmed.

DAVID L. LEWIS, New York, NY, *for Defendant-Appellant.*

LEWIS J. LIMAN, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, George Canellos, Ira M. Feinberg, Assistant United States Attorneys, New York, NY, on the brief), *for Appellee.*

PER CURIAM:

Robert Abrams appeals from a judgment entered following a jury trial in the United States District Court for the Southern District of New York (Sprizzo, *J.*), convicting him of three counts of subscribing to false personal tax returns in violation of 26 U.S.C. § 7206(1). On the first day of the eight-week trial, one juror sent a note asking the court to instruct the jurors not to discuss the case until they were instructed to begin deliberations. The court gave the instruction. On appeal, defendant claims that the district court abused its discretion in failing to investigate the circumstances and substance of any premature jury discussions.

Appendix A
[Decision of the USCA for the Second Circuit]

We are satisfied that the district court did not abuse its discretion and that in any event, there is no appreciable likelihood that the defendant suffered any prejudice from the court's resolution of the incident. Accordingly, we affirm.

BACKGROUND

Robert Abrams was indicted on thirteen counts of violating the Internal Revenue Code. On September 3, 1996, the district court impanelled the jury and gave several preliminary instructions. Judge Sprizzo told the jurors to avoid press accounts of the case, but did not deliver his usual instruction that the jurors should avoid discussing the case among themselves until they were sent to deliberate. None of the parties noticed this accidental omission. The jury was then dismissed for the day and directed to return on the morning of September 5, 1996.

That morning, the court gave some additional preliminary instructions regarding what is (and is not) evidence; the parties gave their opening statements; Internal Revenue Service ("IRS") Revenue Agent Patrick Campbell mounted the witness stand and testified generally about the methods used by the IRS for determining an individual's tax liability; and the trial adjourned for lunch.

When court reconvened after lunch, the clerk handed the judge a note from one of the jurors:

> Your Honor:
>
> Since there are several jury members that are new to the judicial system, please remind them about discussion prior to going to deliberation.
>
> Juror

The following exchange between the court and defense counsel William Aronwald ensued:

Mr. Aronwald: Judge, the only thing is that it appears from the note that the jury may have begun discussing the case even though they haven't been instructed yet. I wonder if the Court would be willing to have the juror who wrote the note just come in to the robing room, perhaps with counsel, and find out what prompted the juror to write this note.

The Court: I think that would be the most improvident thing to do.

Mr. Aronwald: Whatever your Honor would suggest. I am not sure whether there have been any discussions.

The Court: That would be unduly intrusive upon the jury's process, so to speak. For me to go in the jury room and say, "What have you people been talking about?" is really intrusive.

Mr. Aronwald: Just the one juror who wrote the note.

The Court: It is the same problem. I normally would give them an instruction as part of my opening remarks that they not discuss the case during the trial, which is all I intend to do.

Mr. Aronwald: Perhaps we can do this. In response to the note, your Honor can give that instruction, and then, with the Court's permission, perhaps I can just think a

little bit more about it so we don't have to take up any more time today. If on Monday I have a specific application, I will make it then.

The Court: The jury may be of the mind to think they can discuss this case during the trial. I thought I told them they can't.

Mr. Aronwald: I think you did. I think you told them that when you excused them Tuesday night. I think you said they are not permitted to discuss the case.

The Court: I meant discuss it with outsiders. Normally, I tell the jury, as part of my general instructions, that they are not to discuss it even among themselves. There is nothing improper in the jury's discussing the case among themselves before they reach deliberations. There is nothing ipso facto wrong with it. It is just not a good idea, and I tell the jury not to do it. But I don't know that any other judges tell the jury not to do it. You just happen to have a very smart juror who maybe has served on other juries before and has heard that instruction from other judges and thinks I should give it here. That is about as far as I am going to go. I don't know that there is anything wrong with the jury's discussing the case.

I think at the moment what I am inclined to do is to give them my standard instruction, remind them that

> when I said don't discuss the case with anybody, I meant don't discuss it even among themselves. I give a fairly elaborate charge on that.
>
> You have your exception. I think doing anything more would be overly intrusive into the jury process.

The judge then brought the jurors back to the courtroom and told them that he had mistakenly neglected to instruct them not to discuss the case among themselves until deliberations begin, explained that this practice was preferred because the government presented its case first, and directed them not to discuss the case until they have heard all of the evidence. He concluded: "So if any juror has been [discussing the case] or is thinking it is all right to [discuss the case], I want to be sure that you understand that it is not appropriate for you to do that."

After the ensuing eight-week trial, Abrams was convicted on three counts of subscribing to false personal tax returns in violation of 26 U.S.C. § 7206(1). The jury could not reach a unanimous decision on the remaining counts and as to those counts the court declared a mistrial. Abrams was sentenced to 78 months of imprisonment and fined $125,000, and is currently serving his sentence.

DISCUSSION

I

In a footnote, the government raises and lays to rest a threshold matter of jurisdiction. Abrams has been sentenced on the three counts of conviction; but the court declared a mistrial on the other ten counts, which remain outstanding. The government has represented to the district court that it

does not intend to retry those counts if the conviction on the three counts is affirmed; and any retrial has been deferred until this appeal is resolved. The question is whether we have jurisdiction over an appeal from the judgment when other counts of the indictment (as to which the district court declared a mistrial) are unresolved and await retrial.

Our jurisdiction extends to appeals from "all final decisions of the district courts." 28 U.S.C. § 1291 (1994). The Supreme Court has instructed that "the judgment is final for the purposes of appeal when it terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution what has been determined" and that "[f]inal judgment in a criminal case means sentence." *Berman v. United States*, 302 U.S. 211, 212-13, 58 S. Ct. 164, 166 (1937) (citations and internal quotation marks omitted). Further, 18 U.S.C. § 3582(b) provides that, notwithstanding several grounds on which a sentence might be modified, "a judgment of conviction that includes . . . a sentence [of imprisonment] constitutes a final judgment for all other purposes." 18 U.S.C. § 3582(b) (1994); *see United States v. Auman*, 8 F.3d 1268, 1271 (8th Cir. 1993) (noting that § 3582(b) "defines 'final judgment' ").

Without discussing jurisdiction, we have from time to time decided an appeal from a conviction and sentence on less than all counts of an indictment when other counts tried in the same trial remained unresolved after a mistrial. *See United States v. Kaufman*, 311 F.2d 695, 697-99 (2d Cir. 1963); *see also United States v. Sehnal*, 930 F.2d 1420, 1424 (9th Cir. 1991). This approach is faithful to the articulation by Congress and the Supreme Court as to the nature of a final judgment in criminal proceedings. *See* 18 U.S.C. § 3582(b); *Berman*, 302 U.S. at 212-13, 58 S. Ct. at 166; *see also United States v. Helmsley*, 864 F.2d 266, 268 (2d Cir. 1988) ("In a criminal case . . . an appeal usually may be taken only after

sentence has been imposed because that is the final judgment in such a case."). Although the litigation as framed in the indictment may not yet have run its course, the counts of conviction have been resolved and the sentence is ready for execution. The unresolved counts have in effect been severed, and will be resolved another time in a separate judgment. *Cf. United States v. Powell*, 24 F.3d 28, 30 (9th Cir. 1994) ("Rule 14 contemplates the need for two separate trials when severance occurs. Accordingly, each conviction on severed counts should be separately appealable upon the imposition of sentence.").

As the government concedes, the Seventh Circuit has held that a defendant cannot appeal a count on which he has been convicted and sentenced when other counts as to which the district court had declared a mistrial remain unresolved. *United States v. Kaufmann*, 951 F.2d 793, 795 (7th Cir. 1992). As a later Seventh Circuit decision recognizes, that case represents the minority approach. *See United States v. Kaufmann*, 985 F.2d 884, 891 (7th Cir. 1993). If we were to adopt the view of the Seventh Circuit, Abrams would be serving his sentence without acquiring the right to appeal it. The Seventh Circuit in *Kaufmann* undertook to mitigate that unacceptable ramification of its analysis by approving the district court's stay of the execution of the defendant's sentence pending the appeal. *See Kaufmann*, 951 F.2d at 795. But we think that the Seventh Circuit's approach would substantially delay the execution of a valid conviction and sentence, force trials that may never be needed, and impose expense and burden on the prosecution and the defense—undesirable results that are not mandated by the jurisdictional statute.

Accordingly, we hold that we have jurisdiction to consider this appeal.

Appendix A
[Decision of the USCA for the Second Circuit]

II

Abrams argues that the district court abused its discretion by failing to investigate the nature of any premature discussions of the case among the jurors. We disagree.

A

The government argues that Abrams failed to request formally that the district court question the juror who submitted the note, that Abrams thereby failed to preserve his objection to the district court's handling of the situation, and that we should review the district court's actions for plain error.

This is a close question. Defense counsel did seem to acquiesce in the district court's suggested approach, and indicated that he may propose further measures at a later time (which he never did); at the same time, counsel initially asked that the juror be questioned, and the district court noted that defense counsel had reserved his exception. Because we conclude, under the ordinary standard of appellate review, that the district court did not abuse its discretion, we need not consider whether the objection was properly preserved or waived.

B

Abrams does not argue that the district court committed reversible error in omitting to give an instruction on premature jury discussions at the start of the trial. We have previously stated that "[i]t has never been the law of this circuit that the trial judge must admonish the jurors not to discuss the case among themselves, although it has been the practice of most of the judges to suggest that it is advisable to refrain from such discussion until the case is concluded." *United*

States v. Viale, 312 F.2d 595, 602 (2d Cir. 1963). Abrams' argument is addressed to the district court's handling of the juror note situation.

We review a trial judge's handling of juror misconduct for abuse of discretion. *See United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976). Although the events at issue here do not entail juror misconduct—no initial warning having been given—the district court's latitude is no narrower. In conducting our review, we keep in mind that "[c]ourts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias during the course of a trial." *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997). Although such investigation raises fewer concerns when conducted prior to the start of jury deliberations, any such investigation is intrusive and may create prejudice by exaggerating the importance and impact of what may have been an insignificant incident. *See, e.g., United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993). The district court, which "observ[es] the jury on a day to day basis . . . is in the best position to sense the atmosphere of the courtroom as no appellate court can on a printed record." *United States v. Barnes*, 604 F.2d 121, 144 (2d Cir. 1979). "In many instances, the court's reiteration of its cautionary instructions to the jury is all that is necessary." *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994).

Here, we are convinced that the district court did not abuse its discretion in deciding to deal with the juror's note solely by giving a curative instruction. The circumstances surrounding the note suggest that if any discussions had taken place, they were insignificant. The court received the note after the lunch break on the first day of the trial. Jurors had only heard opening statements, and part of the testimony of a single government witness who had reviewed generally the IRS's methods in determining an individual's tax bill. The

jury had been instructed that opening statements are not evidence. Therefore, no actual evidence relating to the defendant's guilt had been presented. In addition, the note did not explain the nature of any discussions or even indicate whether such discussions had taken place. Thus, the possibility of any far-reaching conversation regarding views on the case was minimal and any possible prejudice unlikely. Moreover, because the district court did not initially give an instruction on intra-juror discussions, any such discussions among the jurors did not constitute juror misconduct.

Under the circumstances, the district court's decision to give a curative instruction without making further inquiry was a reasonable solution: any impact on the defendant's right to a fair trial from premature discussion among jurors on the first day of trial was minimal, and any questioning of jurors was likely to be intrusive and to magnify the episode. The instruction effectively communicated that any opinions that had been formed based upon such conversations should be disregarded, thereby dispelling any possible damage.

Finally, even if there were an abuse of discretion, Abrams could not possibly demonstrate actual prejudice. "[P]rejudice is generally the touchstone of entitlement to a new trial when improper intra-jury influences are at issue." *United States v. Resko*, 3 F.3d 684, 694 (3d Cir. 1993). We appreciate that (as Abrams contends) the reason he cannot show prejudice is that the district court refused to create a record by questioning the jurors about their conversations. But we think that this case is distinguishable from *Resko*, where the court found that the prejudice inquiry was made impossible by the district court's failure to question the jurors on the substance of any premature discussions, and therefore assumed prejudice. *Id.* The discussions in *Resko* occurred on the seventh day of a nine-day trial; the jurors indicated in a questionnaire that they had all discussed the case; and the discussions violated a direc-

tive of the court. *Id.* at 688. In Abrams' case, there is no indication of juror misconduct; the jurors were given a curative instruction that we have no reason to think would have been disregarded; and any exchanges among the jurors took place on the first day of an eight-week trial, before any appreciable evidentiary presentation by the government.

CONCLUSION

The judgment of the district court is affirmed.

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Appendix B - United States Constitution Amendment V

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C - United States Constitution Amendment VI

AMENDMENT VI

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.